

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1411

**United States Court of Appeals
For the Second Circuit**

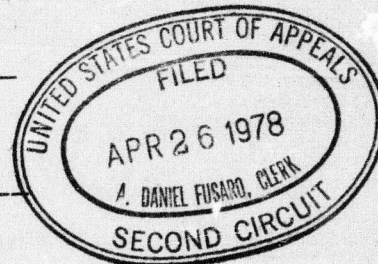
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

LEE DICAMILLO,
Defendant-Appellant.

*On Appeal From the United States District Court
for the Eastern District of New York*

APPELLANT'S BRIEF



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1411

----- X

UNITED STATES OF AMERICA,

Defendant-Appellee,

-against-

LEE DICAMILLO,

Defendant-Appellant.

----- X

BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

The defendant-appellant Lee DiCamillo,¹ appeals from the judgment of Conviction entered against him in the United States District Court for the Eastern District of New York, under Docket No. 77 Cr. 219 (ERN) on September 16th, 1977, wherein the Honorable Edward R. Neaher, District Judge, imposed a sentence of four (4) years pursuant to 18 U.S.C. Section 4205(h)(1) and a special parole of five (5) years (Sentence Minutes, p. 11), upon his conviction for Conspiracy to violate the Federal Narcotic laws under 21 U.S.C. Section 846, and for violation of importation of cocaine into the United

1. Hereinafter referred to as "DiCamillo."

States pursuant to 21 U.S.C. Sections 952(a), 960(a)(1) and 18 U.S.C. Section 2.

THE INDICTMENT

DiCamillo was jointly indicted with one Raul Agudelo-Llano in a three count indictment wherein DiCamillo and Agudelo-Llano were charged in Count One of participating in a Conspiracy commencing on or about March 16th, 1977, to import cocaine into the United States, 21 U.S.C. Section 846. Count Two charged DiCamillo alone with the importation of cocaine into the United States in violation of 21 U.S.C. Section 952(a) and 960(a)(1). In Count Three, the government charged Agudelo-Llano individually with the attempt to possess 2100 grams of cocaine in violation of 21 U.S.C. Section 852(a)(1) and 846.

Both defendants were convicted of the conspiracy count and each of their respective substantive counts. Agudelo-Llano received a five (5) year sentence, suspended and a special parole of ten (10) years, with a direction for immediate deportation to Colombia. Agudelo-Llano had spent some time incarcerated at the Metropolitan Correction Center in New York City awaiting trial. Agudelo-Llano filed no notice of appeal from his conviction.

STATEMENT OF FACTS

On March 16th, 1977, a shipment of furniture valued at \$327 arrived at John F. Kennedy International Airport in Queens, New York, on Avianca airlines from Bogota, Colombia (36)² into the Pan American Cargo area. (37). The shipment was consigned to a "Lee DiCamillo Nahill Moving and Storage Company, 612 Coney Island Avenue, Brooklyn," New York (44). There were some twenty-six or twenty-eight separate items of household furniture (31).

Custom inspector Juan Billoch inspected the shipment on March 16th, at the Pan American Cargo area and released part of the furniture before going to lunch (66, 67-68).

On that same day United States Customs Officer Harold Bataracco commenced working at 8 a.m. He was assigned to a team with the narcotics unit at J.F.K. Two narcotic detecting dogs were also assigned to the unit (30). The team went out to examine various cargo rooms at the airport (31). As they approached the Pan American Airport parking lot for Avianca Airlines they saw a Dayhill Moving and Storage truck loading some furniture into the truck. At least half of the shipment was already on the truck. Bataracco and his team asked if the furniture

2. Paginations in parentheses are from the original record.

had been cleared and were given an affirmative reply by the Dahill drivers who produced shipping documents to the effect. The cargo met with the profile criteria for shipments possibly containing narcotics. The Customs team commenced a closer look at the furniture and began drilling holes into the furniture. As they drilled a hole at the bottom of a hutch "there was a white substance attached to it." (35)

A field test was conducted of the white powder indicating the presence of cocaine (45-46). Custom Officers called in the Drug Enforcement Administration whose agents also made tests which likewise proved positive (47). Upon further disassembly of the furniture a quantity of cocaine was found (55).³

James McNulty was the driver for the Dayhill Moving and Storage Company truck at the airport (90). He was assigned by his company to make the furniture pick-up at J.F.K. (91) McNulty possessed a bill of lading for the furniture with Lee DiCamillo as consignee (93). There were twenty-six pieces of furniture in the shipment. United States Customs asked to unload the items for inspection (97). After the inspection the furniture was placed on the truck and in the company of Drug En-

3. On stipulation it was agreed that there were 1977.02 grams net weight of cocaine hydrochloride.

forcement agents Sharkey and another, McNulty left the airport (100-101) in order to effect a controlled delivery of the furniture to one Rodriguez in Jamaica, Queens, New York. Another employee of Dahill, Peter Lapes had furnished the driver with the name and address where to effect the furniture delivery (101-102). However, McNulty remembered that the name and address on the paper with the name and address was actually written by DiCamillo, a Dahill salesman (102).

When McNulty arrived at his destination in Queens he exited the truck and went to the house and there asked for a "Rodriguez." The party who answered the door went to the basement and returned with another person. McNulty asked him if he was Rodriguez and if the furniture on the truck was his. This second person nodded his head in the affirmative (105). The furniture was thereupon unloaded and brought to the basement apartment. The occupant of the basement apartment was asked to sign the bill of lading which he did with the name of "Carlos A. Rodriguez" (110).

Rene Seguin was the landlord for 90-14 144th Place, Jamaica (151). He rented the basement apartment in December, 1976, to Agudelo-Llano who represented himself at the time as Jarro Marine (155). On March 16th, 1977, Seguin answered the door to the Mayflower truck driver

who asked to see an "Alberto Rodriguez" (159). Seguin then went to the basement and asked the person he knew as Jarro Marine if "There is some furniture from Colombia to Alberto Rodriguez, and is that you?" Agudelo-Llano replied, "Yes, I am expecting it." (160). He further stated to Seguin that "I am Carlos Alberto Rodriguez." (160). Seguin saw Agudelo-Llano handcuffed by the stoop of his house (162).

Thomas J. Sharkey, an agent of the Drug Enforcement Administration, was on duty on March 16th, 1977 (A5).⁴ At about 1:30 to 1:40 p.m. he went to the Pan American Cargo area at J.F.K. and saw a shipment of furniture. Custom's Inspector Badaracco advised him what he found (A5). Sharkey observed two employees from Dahill at the cargo area to pick-up the furniture (A8). One was James McNulty. A decision was thereupon reached to make a controlled delivery to the ultimate consignee in Queens (A9).

McNulty drove the truck and agent Sharkey sat in the cab with him while Agent Priore was in the cargo area of the truck (A11). On arrival at the address McNulty went up the stairs to the house and spoke with an individual which he later learned was Seguin. Seguin went to the rear and returned with Agudelo-Llano (A10). Sharkey asked Agudelo-Llano if the furniture on the truck

4. Minutes of Court Reporter Perry Auerbach commence pagination numbers anew with number "1". Pagination in parenthesis preceded by the letter "A" refer to those trial minutes prepared by Court Reporter Auerbach.

was his and he replied yes (A16). Following this, McNulty and agent Sharkey proceeded to bring the furniture out of the truck and into the basement apartment. Agudelo-Llano lead the way and pointed where the furniture should be placed (A17). Once the hutch was in the apartment, Sharkey gave the bill of lading to Agudelo-Llano and he initialed it once and signed it twice with the name "Carlos A. Rodriguez" (A20-A21).

McNulty and agent Sharkey left the apartment and Sharkey gave a prearranged signal to other agents in the area whereupon Agudelo-Llano was arrested (A24).

Agent Sharkey returned to Drug Enforcement offices at J.F.K. and between 7:30 and 8 p.m., still on March 16th, met DiCamillo for the first time, (A27). Agents John Cipriano and Mike Priore were also there (A28).⁵

DiCamillo advised that he was an employee of Dahill Moving and Storage Company as a salesman. He further told that he knew of the shipment and had personally gone to Bogota, Colombia to initiate it during February, 1977 (A29). At this juncture agent Cipriano interrupted DiCamillo and gave him "Miranda warnings" read to him from a card (A31).

DiCamillo indicated that he wished to be interviewed

5. A hearing pursuant to Rule 41(e), F.R.C.P. was conducted pretrial for the suppression of statements attributed to DiCamillo which was denied by the District Judge.

(A32). Sharkey described his demeanor during this session as talkative, hyper and nervous (A34). Sharkey indicated that DiCamillo informed him that he was to receive \$8,000 once the shipment was terminated or reached its final determination (A32). DiCamillo indicated that he was suspicious about the shipment since he believed it contained stuff. When questioned, DiCamillo indicated that by stuff he believed it "meant narcotics" (A33). DiCamillo also stated, according to agent Sharkey, that while in Colombia a "gentleman asked him to bring up a suitcase containing stuff into the United States but he was too scared to bring it through customs" (A63-A64).

Agent Sharkey terminated the interview because he felt that DiCamillo was being evasive about his answers (A38). DiCamillo then asked for a private interview with Agent Cipriano and spoke with him for an hour and a half (A38). DiCamillo thereafter asked for an interview with Michael J. Tobin, the supervising agent in charge (A39). That conversation lasted about ten minutes (A40). Agent Sharkey did not know DiCamillo prior to March 16th, 1977, nor was he known to the Drugs Enforcement Administration (A47). Sharkey only knew that DiCamillo was in Colombia in February, 1977, because DiCamillo told him (A47-A48). It was DiCamillo who turned over to agent Sharkey the air passage ticket he used for that trip

(A48) During the conversations with DiCamillo he also mentioned the names of people who he had seen in Colombia (A59). The names of Gomez, the co-defendant Victor Agudelo-Llano and Hondo Galeano were mentioned during the conversation (A60-A61). Sharkey also quoted DiCamillo as stating, "It's tough to admit when your're wrong." (A62) Referring to his report on the interview, agent Sharkey advised that DiCamillo told him (A64):

"DiCamillo knew that there was some stuff concealed in the furniture and that the stuff could be narcotics."

Agent Priore indicated that he was also employed by the Drug Enforcement Administration (A104) and related the same events on March 16th, 1977, at the J.F.K. Pan American cargo area and at the Queens residence of Agudelo-Llano which agent Sharkey testified to previously.

Thereafter, Priore and agent Donohue went to the Brooklyn offices of Dahill Mayflower (A120) at 602 Coney Island Avenue (A122) where they spoke with DiCamillo, who was not a suspect at the time (A122). DiCamillo advised the agents (A125):

"... that he was in fact the salesman for this particular shipment, that he was acting in the normal course of business or his normal course of business and arranged for a particular shipment, and he was in the process of setting up an account with these particular individuals for an unspecified volume of furniture to be

shipped from Bogota, through the Dahill Mayflower warehouse in New York to other ultimate consignees in the New York area."

DiCamillo further volunteered the information that in furtherance of this account he had taken a trip to Bogota "and at the time went into his attache case which was on the desk and offered an airline ticket or a ticket receipted copy and a photograph." (A125-A126). At this point agents Priore and Donohue invited DiCamillo to Drug Enforcement offices at J.F.K. to which DiCamillo agreed.

During the course of the evening, despite the fact that the agents involved wanted to go home, it was DiCamillo who kept the conversations going and asked for private interview with separate agents (A131).

Agent John Cipriano, a special agent for the Drug Enforcement Administration (A164) went to the Pan American Cargo area between 3:20 and 4 in the afternoon and saw agents Sharkey, Priore and Kennedy there with two drivers from Mayflower. He also saw some furniture in which cocaine was secreted (A165).

The furniture was delivered to an individual named Rodriguez in Queens, at 90-14 144th Place in Jamaica (A166). Cipriano followed the Dahill truck in his own vehicle (A167). When agent Sharkey removed his hat he understood it was a given signal to move in for the arrest (A169). Upon the arrest of Agudelo-Llano

he returned to D.E.A. offices at J.F.K. (A171). At around 7:30 or 8 that evening he met with Lee DiCamillo (A172) who advised him that he had been in Bogota and that he had given the agents his flight ticket (A173). At this time "Miranda warnings" were read to DiCamillo from a form (A173). DiCamillo continued to be cooperative and advised, "I want to talk to you, I want to clear the air." (A174).

DiCamillo then stated:

"[DiCamillo] indicated that he was contacted by an individual named Galeano, Hondo Galeano, to make arrangements for the shipments. He received, he stated that he received \$8,000 from Mr. Galeano with regard to this shipment. He then indicated that he traveled to Colombia which he had stated previously to make some sort of arrangement for the shipment" (A176)

"... at first he had indicated that he had received a phone call from Mr. Galeano. Subsequently, he said he met Mr. Galeano - a girlfriend named Elisha. When he was in Colombia Mr. Galeano asked him to take back a suitcase and he refused and we asked him why he refused and he said he believed it contained stuff. He was also asked if he was afraid of that suitcase why did you get involved in this shipment which he indicated he wished the shipment didn't come in at all, and he indicated he was asked, "Do you think there was anything wrong with the shipment and he said. 'Yes,' and he was asked, 'What did you think was wrong with this shipment' and he stated, 'I believe it contains stuff.' ... when he was asked 'What did you think stuff was', it could mean anything, diamonds, anything." (A176-A177)

In a private conversation between DiCamillo and Agent Cipriano, DiCamillo stated that "he and Elisha had received on at least two other occasions sums of money from Mr. Galeano and that they had exchanged I believe it was, at Elisha's bank for large bills." (A185)

Peter J. Lapes testified for the Government and informed that he was Assistant Vice President for the Dahill Moving and Storage Company for the past three years (A209). He advised that DiCamillo was a commissioned salesman for Dahill for approximately one year. (A210). Di Camillo was a commissioned salesman for Dahill for approximately one year. (A210). DiCamillo advised Dahill of his trip to Colombia indicating that he had a potential client who was paying for his trip and expenses there. Dahill would not cover any expenses and/or his time to take such a trip. Lapes indicated that he felt it was "unheard of that the shipper was paying for this salesman's trip to go down to Colombia." (A211-A212) At that meeting DiCamillo produced \$8,000 cash which he claimed he had received from his potential client and which he wanted Dahill to hold. (A213). Lapes testified that the result of the meeting at Dahill was to advise DiCamillo not to make the trip (A214).

Lapes received a telephone call from Pan American advising him that the Avianca shipment of furniture had

arrived. There were \$780 in air freight charges and Lapes advised DiCamillo that inasmuch as this was not a regular account these charges would have to be prepaid (A216-A217). DiCamillo indicated to Lapes that there would be no problem and thereafter DiCamillo furnished a money order for the air freight charges. (A218) The money order was made out to Dahill Moving and Storage (A218) , and was received about nine days before the shipment arrived on March 16th (A224).

THE DEFENSE CASE FOR APPELLANT DiCAMILLO

Lee DiCamillo testified in his own behalf and indicated that he was forty years old having been born in Brooklyn, New York, and that he had been separated and divorced from his wife approximately four years. Moreover, he had never been convicted of any crime. His employment was District Manager for Dahill Mayflower for approximately the last 13 months. His salary was a draw against commissions every week plus expenses (A330-A331).

DiCamillo testified that he had met one Alicia Duque in 1976 and that they have marriage plans together. It was through Ms. Duque's girlfriend who visited their home in Ozone Park that he met her husband, a person by the name of Galeano. DiCamillo and Galeano spoke about mutual business and met several times thereafter.

Through Mario Galeano, DiCamillo also met Victor Agudelo-Llano and Mario Galeano's brother Fernando Galeano. (A337-A338).

Galeano expressed an interest in exporting from Colombia into the United States novelty furniture and samples. He expressed interest in DiCamillo's association with Dahill and asked to see their facilities. DiCamillo brought Galeano to Mayflower at 802 Coney Island Avenue in Brooklyn and introduced him to Carmine, who was the warehouse manager and also to Andre Mantenao, who was a Vice President for Dahill Mayflower (A339-A340). Thereafter, Mario Galeano visited with DiCamillo again at his home in Ozone Park and wanted to deal with Dahill-Mayflower and open an account for which he gave \$8,000 cash to DiCamillo (A342). DiCamillo converted the \$8,000 from small bills into large ones at his personal bank where he was known and then brought the money over to Dahill Mayflower. He spoke with the Chairman of the Board Michael DiBattista, who also held the position of Senior Vice President. Peter Lapes was also there (A344-A345). DiCamillo spoke with them about the possibility of this new account which met with mixed reactions (A346). Lapes appeared negative toward the idea while another Dahill Mayflower official, also present, Richard Masterson, was rather optimistic and DiBattista

took a wait and see position. In any event it was suggested to DiCamillo that the money should be returned (A347). DiCamillo thereafter returned the money to Galeano (A347-A348).

DiCamillo travelled to Colombia in February, 1977, in the company of one Oscar Gomez introduced to him by Galeano, who took care of expenses including the airfare (A349).

When DiCamillo arrived in Bogota he stayed at the Hotel Cardenal and met with the Dahill Mayflower representative there, George Knappstein, owner and President of Potthast Moving and Storage. They were assigned to forward the furniture freight shipment on Avianca into J.F.K. Knappstein's name and address was obtained through Peter Lapes (A353). While in Bogota, DiCamillo spoke by telephone with his company and specifically to Mr. DiBattista (A353).

While he was in Bogota, DiCamillo was offered a suitcase which he declined (A358). He returned from Bogota alone (A359). Before leaving, DiCamillo was advised that Carlos A. Rodriguez at the address indicated would receive the shipment in New York (A360). When Lapes advised DiCamillo of the air freight charges DiCamillo called Galeano and obtained the money in the form of a money order which he turned over to the company

directly. (A364).

On March 16th, agents of the Drug Enforcement Administration visited with DiCamillo at the offices of Dahill Mayflower in Brooklyn. He advised them that he would do everything possible to cooperate with them and told them of his trip to Colombia and cancelled airline ticket, photograph and other papers relating to his trip there (A368). He voluntarily accompanied the agents to their offices at J.F.K. (A369).

DiCamillo denied that he knew that the shipment contained narcotics of any kind or that he knew cocaine was secreted in any of the items of furniture forwarded into New York from Bogota (A370). DiCamillo claimed that he was somewhat suspicious when he was offered a new suit in Colombia, a suitcase, received no credit references from his contacts in Bogota, that he had previously received \$8,000 cash from them without giving receipt although he had returned the money, that all his expenses were paid. On the other hand DiCamillo felt that he could not put his finger on his suspicions which he had but on the other hand felt that this might be an important business relationship which he was establishing which he did not want to lose because of unfounded suspicions (A371-A372).

When DiCamillo was questioned by the Drug Enforcement agents they did not know he had been in Colombia, or anything about the \$8,000, or the offer of a new suit and suitcase and the names of the persons he had met in New York and Bogota. It was DiCamillo who furnished this information in an effort to cooperate with them (A373-A374).

THE DEFENSE FOR VICTOR RAUL AGUDELO

Agudelo-Llano testified in his own behalf and maintained that he had arrived in this country illegally through Mexico and that he lived in Jamaica at 99-44 144th Place (A454). He told his landlord Sequin that his name was Hiro Marine which was not his true name (A455). While here he worked at Los Guaduales Restaurant in Jamaica as a dish washer and it was there that he met a man by the name of Carlos A. Rodriguez (A457). It was this gentleman who brought him to the home of DiCamillo (A460). Rodriguez asked Agudelo-Llano if he would do him a favor. He was expecting some furniture from Colombia and asked Agudelo-Llano to receive it at his apartment and hold it for him for one or two days. Agudelo-Llano indicated that he would have to obtain permission from the owners of the house which he received (A463-A464). For his troubles Rodriguez promised Agudelo-Llano \$50 or \$60. On March 16th, the furniture arrived

and on that day during the course of the delivery he was arrested (A464-A465).

Agudelo-Llano explained that he was unaware of business dealings between the man he called Rodriguez, named Galeano by DiCamillo, and the latter.

POINT ONE

IT WAS ERROR FOR THE DISTRICT COURT
TO HAVE DENIED DiCAMILLO'S APPLICATION
UNDER RULE 29, F.R.C.P. FOR JUDGMENT
OF ACQUITTAL BASED UPON THE INSUFFICIENCY
OF THE EVIDENCE

At two separate and critical periods during the course of trial the appellant DiCamillo moved the District Court for Judgment of Acquittal on each of the two counts charged against him in the indictment. On both occasions the Court denied the Rule 29 motions. The District Court failed to adopt the standard set forth in Curley v. United States, 160 F. 2d 229 (D.C. Cir.) cert. den. 331 U.S. 837 (1947), wherein it was indicated, that it was incumbent upon the trial judge to determine whether or not a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If the trial judge concluded that upon the evidence there must be such a doubt in a reasonable mind he was obligated to grant the motion.

In that the motion pursuant to Rule 29 was made both at the end of the Government's case and at the end

of the entire case, and after DiCamillo had testified, the Court on the latter application was bound to review all the evidence including that of the defendant DiCamillo which if it raised a reasonable doubt as a matter of law the Court was again bound to grant the application.

At most the Government's proof was based upon statements offered by DiCamillo as to his trip to Colombia and his suspicious as a result of the nature of the business negotiations between himself and the colombians. At most, the jury was asked to speculate when it was within the District Court's providence to grant Judgment of Acquittal either at the close of the Government's case or upon the entire case.

POINT TWO

THAT THE REQUIREMENTS OF ANDERS V. CALIFORNIA, 386 U.S. 738, HAVE BEEN COMPLIED WITH.

Counsel has endeavored to comply with his obligation to the appellant and has set forth the facts herein as well as they are pertinent. Accordingly, it is respectfully submitted that the requirements of Anders v. California, supra, have been complied with. 6

6. As to DiCamillo the District Court practically sustained all of DiCamillo's counsel's objections and upon objection of defense counsel refused to charge the jury on "conscious avoidance" as set forth in United States v. Bright, 517 F.2d 584 (2nd Cir. 1975) and United States v. Brawer, 482 F. 2d 117 (2nd Cir. 1973).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND/OR THE INDICTMENT DISMISSED,
TOGETHER WITH SUCH OTHER AND FURTHER
RELIEF AS MAY BE JUST AND PROPER.

Respectfully submitted, 9

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LOPEZ

STATE OF NEW YORK)
 : ss.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 26 day of April 1978 deponent served the within *BRIEF* upon U.S. Atty. East. Dist. of NY

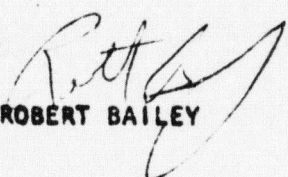
attorney(s) for

Appellee

In this action, at

225 Cadman Plaza, East, Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 26 day
of April, 1978, 1977X


WILLIAM BAILEY

Notary Public, State of New York
No. 43-4661518
Qualified in Richmond County
Commission Expires March 30, 1979